Office Supreme Court, U.S.
FILED
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JAMES D. MAHER
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NO. 4[redacted]1[redacted]15

IN THE

Supreme Court of the United States

YAZOO AND MISSISSIPPI VALLEY RAILROAD COMPANY

Plaintiff in Error.

vs.

CITY OF CLARKSDALE

Defendant in Error.

BRIEF IN REPLY UPON MOTION TO DISMISS.

HEDERMAN BROS., JACKSON.

In the Supreme Court of the United States

YAZOO AND MISSISSIPPI VALLEY RAILROAD COMPANY

Plaintiff in Error

VS. No....

CITY OF CLARKSDALE

Defendant in Error.

BRIEF IN REPLY UPON MOTION TO DISMISS

I.

We submit, with deference, counsel for Plaintiff in Error, in their brief, failed to notice the amendment of Section 237 of the Judicial Code, and, as amended, the construction placed thereon by this Court in its numerous, current decisions; all of which are, with deference, conclusive in favor of Defendant in Error.

II.

Writ of Error not properly allowed under Constitution of Mississippi.

By amendment, Laws 1916, page 209, the Constitution of Mississippi now reads:

> "The Supreme Court shall have power, under such rules and regulations, as it may adopt, to sit in two divisions of three judges each, any two of

> whom, when convened, shall form a quorum; each subdivision shall have **full power to hear and adjudge all causes** that may be assigned to it by the Court. In the event the judges composing any division shall differ as to the judgment to be rendered in any cause, or in the event any judge of either division . . . . . shall certify, in his opinion, any decision of any division of the court is in conflict with any prior decision of the Court, or any division thereof, the cause shall then be considered and adjudged by the full court or a quorum thereof." (Italics ours.)

It appears from the record (or more properly the supplemental record the contents of which was by inadvertence not supplied by the Clerk in the original record, and, wherefor, if necessary, we shall ask for certiorari) that the Mississippi Supreme Court is now divided into divisions called, respectively, "A" and "B."

Chief Justice Smith presides over Division A and Presiding Justice Cook over Division B. These courts have separate minutes, exercise several and separate authorities, and, when considering a cause, each has, independently of the other "full power to hear and adjudge all causes."

The limitation with reference to a dissenting opinion and with reference to an overruling of a prior decision is not here applicable, because Division B of the Supreme Court of the State of Mississippi, as shown by the record, decided this cause unanimously and affirmed the decision of the lower court without any interposition of Division A of the Supreme Court of the State of Mississippi, and yet, notwithstanding that Chief Justice Smith did not participate in or concur in the affirmance of this decision by "Division B," he has assumed, contrary to

the Constitution, to grant this writ of error, and thereby erred, in this that, full power to hear and adjudge was vested in Division B, over which he, as Chief Justice Smith, has no authority whatsoever.

Writs of error remove the judgment of an inferior court to this Tribunal and are governed by the usages and principles of the common law. **Payne v. Niles**, 20 How., 219.

And, as said in the classic definition of a writ of error in Cohen Virginia, 6 Wheaton, 265:

It is "a commission by which the judges of one court are authorized to examine a record upon which a judgment was given in another court, and upon such examination, to affirm or reverse the same according to law."

Without a writ of error issued according to law, no jurisdiction vested in this Court. **County v. Durant**, 7 Wallace 694; **Ex Parte Rawlston**, 119 U. S., 613.

As said in **Hodge v. Williams**, 22 Howard, 87:

> "And this court has no appellate jurisdiction over a judgment of the court below, unless the judgment is brought here, according to the Act of Congress—that is, by writ of error, and that writ, from its nature and character, must be sued out by the party who alleges error in the judgment of the inferior court. This writ is not a mere matter of form, but a matter of substance prescribed by law and essential to the jurisdiction of this court."

In Section 999 of the Revised Statutes, the writ of error, when granted, must be signed by "the Chief Justice, or judge, or chancellor of such Court, **rendering the**

judgment . . . . . complained of . . . . ." (Italics ours.)

Here, the allowance was by Chief Justice Smith, who was not the Chief Justice or Judge of the Court rendering the judgment, and therewith had no connection whatsoever. Presiding Justice Cook was the Judge of the Court rendering the judgment complained of; and it was he who signed the minutes and made effective the decision against Plaintiff in Error, and it is he who should, under the statute, have signed and allowed the writ of error.

The record is now in Division B of the Supreme Court of the State of Mississippi and the writ of error should have run to that Division and been allowed by the presiding judge thereof.

Underwood v. McVeigh, 131 U. S., CXIX-Appx., 21 L. ed., 952, the Supreme Court dismissed the writ of error directed to the Corporation Court instead of the Court of Appeals.

In **Atherton v. Fowler,** 91 U. S., 143, it was ruled that the record could be in but one court at a time and the writ must be directed to that court.

Here, the record is in Division B of the Supreme Court of the State of Mississippi.

See, also **Wurtz v. Hoogland,** 105 U. S., 701; **Polleys v. Improvement Co.,** 113 U. S. 81; **Mulcrevey v. San Francisco,** 231 U. S., 669; **Wedding v. Miller,** 192 U. S., 593; **Rothschlid v. Knight,** 184 U. S., 334.

In **Havnor v. New York,** 170 U. S., 408, it was held:

> "A writ of error and a citation signed by an Associate Judge of the New York Court of Ap-

peals, who does not purport to act as Chief Judge or Chief Judge pro tem., is not sufficient under U. S. Rev. Stat. No. 999, to give jurisdiction to the Supreme Court of the United States, although there was an affidavit by counsel that the Chief Judge of the Court is abroad in Europe, and will be for some space of time to come."

This decision was approved in **Missouri Valley Land Company v. Wiese**, 208 U. S., 244.

As stated, the record here shows, that this case was decided by Division B in the Supreme Court of Mississippi, which constitutes an entirely separate judicial tribunal from Division A and the decisions rendered by each division are separate and several from the decision rendered by the other division and there is no authority for one Division to reverse, annul or in any way question a decision of the other division when made by a unanimous court, except when there happens to be a conflict between that decision and a prior decision rendered by the court en banc or by either division thereof. Unless this obtains, the courts are absolutely independent, and, being so independent, here, by reason of that condition not obtaining, this writ of error was improperly and improvidently allowed.

Respectfully submitted,

GERALD FITZ GERALD,
GEORGE F. MAYNARD,
MARCELLUS GREEN,
GARNER W. GREEN,

For Defendant in Error.

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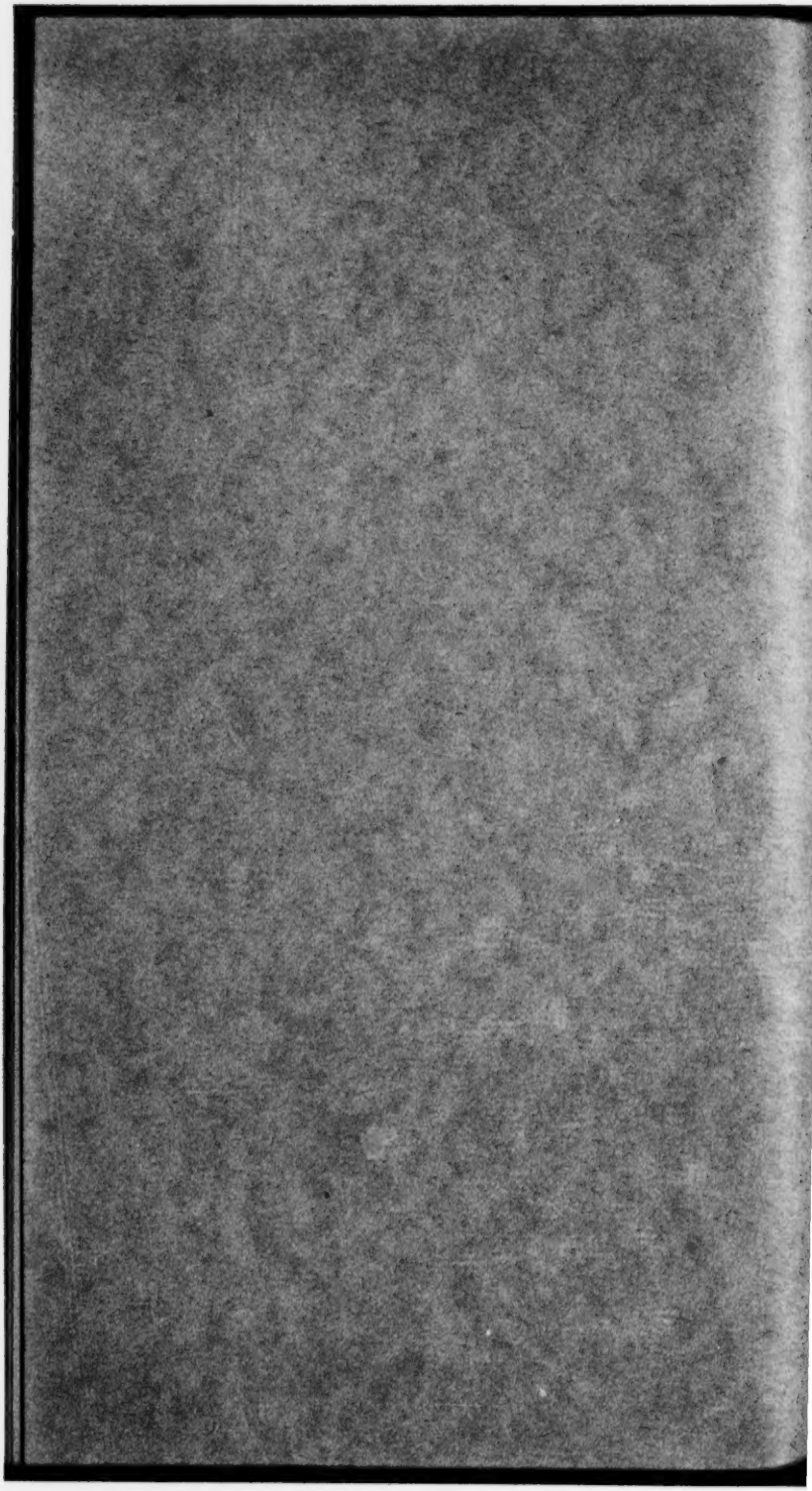
YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY

vs.

CITY OF CLARKSDALE.

SUPPLEMENTAL TRANSCRIPT OF RECORD IN SUPPORT OF MOTION TO DISMISS.

HEDERMAN BROS., JACKSON.



SUPREME COURT OF MISSISSIPPI

OCTOBER TERM A. D., 1915

Monday, January 31st, 1916.

Court met pursuant to adjournment sitting En Banc. Present the Honorable Sydney Smith, Chief Justice, J. Morgan Stevens, John B. Holden, Clayton D. Potter, and Eugene O. Sykes Associate Justices, Geo. C. Myers, Clerk and C. L. Johnson, Marshal.

RULE 34.

Ordered that the following rule for separating the Court into two permanent divisions be and the same is hereby adopted.

Section 1. For the convenient dispatch of business the Court shall be separated into two divisions of three Judges each—one from each district, designated respectively as Division "A" and "B."

Sec. 2. Each of the Judges shall be assigned to one of the divisions by order entered upon the minutes of the Court when sitting in banc, and shall thereafter, during his term of office remain a member of such division unless transferred to the other by order of the Court entered upon the minutes when sitting in banc.

Sec. 3. The Chief Justice shall be the presiding Judge of the division of which he is a member. The presiding Justice of the other division shall be the Judge thereof who has been for the longest time continuously a member of the Court, and in event no Judge of a division

has been continuously a member of the Court for a longer time than the others, the Court shall designate by order entered upon the minutes when sitting in banc, which of the said Judges shall be the presiding Justice thereof. In the absence of the presiding Judge, the Judge of the division who has been for the longest time continuously a member of the Court shall be the acting presiding Judge thereof; and in event the two Judges of a division other than the presiding Justice thereof shall have had the same period of continuous service, the Court shall designate by order entered upon its minutes when sitting in banc, which of the said Judges shall preside in the absence of the presiding Judge.

Sec. 4. Each division, except when prevented by the sitting of the Court in banc, or when the Court in banc shall otherwise direct, shall sit during alternate weeks; the minutes of a division shall be signed by the Judge thereof then presiding.

Sec. 5. The Court in banc may sit on any day of a term without previous notice being given thereof; but when a case is ordered to be argued before the Court in banc, the Clerk, at least one week before the day set for hearing, shall mail a notice to each attorney or firm of attorneys interested therein.

Sec. 6. In event any Judge of either division within fifteen days after a judgment has been rendered, or an order entered by either division, or while a Suggestion of Error therein is pending, shall certify in writing filed with the Clerk that in his opinion such order or judgment is in conflict with prior decision of the Court, or of either division thereof, the order or judgment shall be set aside by an order entered on the minutes of the first session thereafter of either the Court en banc or of a division; and the Chief Justice shall cause the full Court, or a quorum thereof, to assemble in conference at a convenient time for the decision of the case; and the judg-

ment agreed on shall be entered at any sitting of the Court en banc.

STATE OF MISSISSIPPI,
HINDS COUNTY:

I, Geo. C. Myers, Clerk of the Supreme Court of the State of Mississippi, and the legal custodian of the records of said Court, do hereby certify that the foregoing is a true and correct copy of Sections 1, 2, 3, 4, 5 and 6 of Rule 34 of said Court Revised and Promulgated on October 14th, 1918, and in force at the March Term, 1919 of said Court; that said rule was adopted by this Court on January 31st, 1916, and appears of record on Minute Book "S" at page 359.

(Seal) Given under my hand, and seal of said Court affixed at office in the City of Jackson this 16th day of October A. D. 1919.

GEO. C. MYERS, Clerk.

Ordered that Judges Sydney Smith, John Burt Holden and Eugene Octave Sykes be assigned to Division "A" and that Judges Sam C. Cook, J. Morgan Stevens and Clayton D. Potter be assigned to Division "B" and that Judge John Burt Holden be and he is hereby designated as the presiding Judge of Division "A" in the absence of the regular presiding Judge thereof.

Ordered that the Court sitting En Banc do now adjourn and the session be continued by Division "A."

(Signed) SYDNEY SMITH, Chief Justice.

Saturday, December 23rd, 1916. October term 1916.

Court met pursuant to adjournment Division "B" sitting. Present Honorable Sam C. Cook, presiding Justice, the Hon. J. Morgan Stevens and the Hon. Clayton D. Potter associate Justices, Geo. C. Myers, Clerk, and C. L. Johnson, Marshal.

The Honorable Geo. H. Ethridge having been elected to succeed Judge Clayton D. Potter, took his seat on January 6th, 1917.

Saturday, January 6th, 1917. October term 1916.

The Court met pursuant to adjournment Division "B" sitting. Present the Honorable Sam C. Cook presiding Justice, the Hon. J. Morgan Stevens, the Hon. Geo. H. Ethridge associate Justices, Geo. C. Myers, Clerk, and C. L. Johnson, Marshal.

March term 1919, Monday, March 3rd, 1919.

Pleas and proceedings had and done at a regular term of the Supreme Court of the State of Mississippi, begun and held at the Court Room in the City of Jackson, on the first Monday, being the 3rd day of March A. D. 1919, Division "B" sitting; present the Honorable Sam C. Cook presiding Justice, the Hon. J. Morgan Stevens, and the Hon. Geo. H. Ethridge associate Justices, Geo. C. Myers, Clerk, and C. L. Johnson, Marshal.

Yazoo & Mississippi Railroad Company,

20542. Vs.

City of Clarksdale.

Argued orally by H. D. Minor for appellant, and Gerald Fitzgerald for appellee, and submitted on briefs by H. D. Minor and [illegible] N. Burch for appellant and Maynard & Fitzgerald for appellee.

Ordered that Court do now adjourn until 9:30 o'clock Tuesday morning, March 4th, 1919.

(Signed) SAM C. COOK, Presiding Justice.

March term A. D. 1919; Monday, March 31st, 1919.

Court met pursuant to adjournment, Division "B" sitting. Present The Hon. Sam C. Cook presiding Justice, the Hon. J. Morgan Stevens and the Hon. Geo. H. Ethridge associate Justices, Geo. C. Myers, Clerk, and C. L. Johnson, Marshal.

Yazoo & Mississippi Railroad Company,

20542. Vs.

City of Clarksdale.

This cause having been submitted on a former day of this term on the record herein from the Chancery Court of Coahoma County, 2nd District, and this Court having sufficiently examined the same and being of opinion that there is no error therein, doth order, adjudge and decree that the decree of said Chancery Court rendered in this cause on the 20th day of April, 1918, be and the same is hereby affirmed, and that appellee do have and recover of appellant and D. A. Scott and E. M. Yerger, sureties in the appeal bond the costs of this cause in this Court and in the Court below to be taxed etc.

Ordered that Court do now adjourn until 9:30 o'clock Tuesday morning, April 1st, 1919.

(Signed) SAM C. COOK, Presiding Justice.

STATE OF MISSISSIPPI,

HINDS COUNTY.

I, Geo. C. Myers, Clerk of the Supreme Court of the State of Mississippi, and the legal custodian of the records of said Court, do hereby certify that the foregoing is a true and correct transcript of the Minutes of the Supreme Court of the State of Mississippi applicable to the organization of Division "B" of said Court, and of the Minutes pertaining to the hearing, submission and decision of that cause lately pending therein, styled Yazoo and Mississippi Valley Railroad Company vs. City of Clarksdale, and now pending in the Supreme Court of the United States on Writ of Error issued from

the United States Supreme Court to the Supreme Court of the State of Mississippi.

(Seal) Given under my hand, and seal of said Court affixed at office in the City of Jackson this 16th day of October A. D. 1919.

GEO. C. MYERS, Clerk.

Clerk's fee for copy, $2.50.